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FROM Will Thompson 

TO: US Department of Justice

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MESSAGE: I have been following the United States vs. Microsoft Corporation case regarding violations of the Tunney Act by Microsoft. I have reviewed commentary on the case by such learned scholars as Justice Robert Bork. I feel that the current settlement proposed is inadequate to remedy Microsoft's past illegal activity or protect the public from similar behavior in the future. My comments are attached.

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I object to the proposed settlement for resolving the case between Microsoft and the US and various state governments on the matter of illegal anti-trust practices by Microsoft. It does not go far enough to exact a penalty from Microsoft for past illegal activity or impose sufficient contractual or statutory restraints on the corporations future behavior.

First and foremost I noticed a lack of any definition of "Operating System" and "Middleware" that distinguishes between the functionality of either. Does this not leave Microsoft free to create its own interpretation of which category software offering a particular functionality falls into? Given Microsoft's history of incorporating functionality into its definition of "Operating System" does this not now leave them free to continue their predatory monopolistic practice of excluding competition by redefining what an "Operating System" is? This leaves it up to a violator of the Tunney Act to decide what is or is not illegal behavior.

I also question the following sections of the agreement:

"C. Microsoft shall not restrict by agreement any OEM licensee from exercising any of the following options or alternatives: ...

3. Launching automatically, at the conclusion of the initial boot sequence or subsequent boot sequences, or upon connections to or disconnections from the Internet, any Non-Microsoft Middleware if a Microsoft Middleware Product that provides similar functionality would otherwise be launched automatically at that time, provided that any such Non-Microsoft Middleware displays on the desktop no user interface or a user interface of similar size and shape to the user interface displayed by the corresponding Microsoft Middleware Product."

This clause seems to disallow any competitor from offering functionality (i.e. icons, menus) that provides functionality similar to a Microsoft product. This would have the effect of placing any competitor at a disadvantage since they are not allowed to offer a similar work environment to the end user.

"C. Microsoft shall not restrict by agreement any OEM licensee from exercising any of the following options or alternatives: ...

5. Presenting in the initial boot sequence its own IAP offer provided that the OEM complies with reasonable technical specifications established by Microsoft, including a requirement that the end user be returned to the initial boot sequence upon the conclusion of any such offer."

This clause seems again to leave it up to a violator of the Tunney Act to define what is "reasonable".

"J. No provision of this Final Judgment shall:

2. Prevent Microsoft from conditioning any license of any API, Documentation or Communications Protocol related to anti-piracy systems, anti-virus technologies, license enforcement mechanisms, authentication/authorization security, or third party intellectual property protection mechanisms of any Microsoft product to any person or entity on the requirement that the licensee: (a) has no history of software counterfeiting or piracy or willful violation of intellectual property rights, (b) has a reasonable business need for the API, Documentation or Communications Protocol for a planned or shipping product, (c) meets reasonable, objective standards established by Microsoft for certifying the authenticity and viability of its business, (d) agrees to submit, at its own expense, any computer program using such APIs, Documentation or Communication Protocols to third-party verification, approved by Microsoft, to test for and ensure verification and compliance with Microsoft specifications for use of the API or interface, which specifications shall be related to proper operation and integrity of the systems and mechanisms identified in this paragraph."

Again the settlement relies on the violator of the Tunney Act to define which organizations constitute a business competitor. This clause would allow Microsoft to deny access to information about its API and Protocols to such organizations as the Free Software Foundation, Linux.org and BSD.org and others that, if Microsoft's sales memos are to be credited, present a strong competition to their illegal monopoly.

In short, this proposed settlement does little to (1) punish Microsoft for its illegal activities or (2) impose restrictions on continuing its anti-competitive practices. I urge the Department of Justice to renegotiate the settlement under terms that would truly restrict Microsoft's predatory anti-competitive activities or would breakup the company into an operating system division, middleware division, and applications division.

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